

Rule 40 Search Warrants

By Sandi Johnson, SLCO Deputy District Attorney

Why a Warrant

- I. Warrants are presumed valid and are given great deference
 - a. State v. Saddler, 2004 UT 105, ¶ 7 Court must “afford the magistrate great deference and consider the affidavit relied upon by the magistrate in its entirety and in a common sense fashion.”
 - b. State v. Deluna, 2001 UT App 401, ¶ 10 “a grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment’s strong preference for searches conducted pursuant to a warrant.”
- II. Officers are protected by the “Good Faith Exception”
 - a. State v. Horton, 848 P.2d 708, 711 “Evidence obtained by officers acting in good faith, objectively and reasonably relying on a search warrant issued by a neutral and detached magistrate, need not be excluded even if the warrant is subsequently invalidated by a lack of probable cause. There is a presumption that when an officer relies upon a warrant, the officer is acting in good faith.”

Getting a Warrant

- I. Probable cause to believe that the property or evidence seized is. . .
 - a. In violation of the criminal code because it was:
 - i. Unlawfully acquired or is unlawfully possessed
 - ii. Has been used or is possessed for the purpose of being used to commit or conceal the commission of an offense; or
 - iii. Is evidence of illegal conduct.
 - b. Evidence of a violation of health, safety, building, or animal cruelty laws or ordinances [Rule 40(k)]
 - i. Must be approved by prosecuting attorney
 - ii. Peace officer shall serve and execute the warrant
 - 1. Others may accompany, i.e. health, fire, building or animal control officer
 - c. List the crime(s) or violation(s) the items will be evidence of

- II. Shall particularly describe the person or place to be searched AND the person, property, or evidence to be seized [Rule 40(c)(1)]
- a. Describing the person or place to be searched
 - i. Person
 - 1. Physical Description (height, weight, hair, etc.)
 - 2. Name, DOB, SSN (where possible)
 - ii. Place: So that an officer who has never been there can find it specifically
 - 1. “We have upheld warrants like the one at issue where one part of the description is inaccurate, but the description has other accurate information to identify the place to be searched with particularity. A technically wrong address does not invalidate a warrant if it otherwise describes the premises with sufficient particularity so that the police can ascertain and identify the place to be searched.” Harman v. Pollock, 446 F.3d 1069 (10th Cir. 2006)
 - 2. Do NOT rely on the address alone: “To describe the place to be searched with particularity as is required, certainly means that if the place has an established street address, and this is the only method of description utilized, the correct address, and only the correct address, will suffice.” People v. Royse, 477 P.2d 380 (Colo.1970)
 - b. Describing the person, property, or evidence to be seized
 - i. Evidence: Describe it with enough particularity that the officers know what they are looking for
 - 1. “the limitation on the scope of a search pursuant to a warrant is drawn in terms of those areas where it is reasonable to believe that the listed evidence *could* be located.” State v. Romero, 660 P.2d 715 (Utah 1983)
 - ii. Fruits or Instrumentalities
 - 1. Catchall so that if you observe items that can be articulated as fruit or instrumentality, you can seize it under the warrant
 - iii. What if you find something else you weren’t planning to find
 - 1. Plain View: In this situation, a warrantless *seizure* is justified if: (1) the officer is lawfully present where the search and seizure occur; (2) the evidence is in plain view; and (3) the evidence is clearly incriminating.
 - c. **THERE MUST BE A LINK BETWEEN THE DESCRIPTION SECTION AND THE PROBABLE CAUSE PORTION OF THE AFFIDAVIT.**

III. Affidavit of Probable Cause

a. Probable Cause

- i. Flexible, common-sense standard that “does not demand any showing that such a belief be correct or more likely true than false.” Texas v. Brown, 460 U.S. 730 (1983)
- ii. “ [D]oes not require more than a rationally based conclusion of probability and that probable cause is only the probability, and not a prima facie showing, of criminal activity.” State v. Spurgeon, 904 P.2d 220

b. “Hero Statement”

- i. If the evidence needs interpretation, the judge needs to know the affiant’s training and experience
 1. Moreover, “the validity of the probable cause determination is made from the objective standpoint of a prudent, reasonable, cautious police officer ... guided by his experience and training. The presence of commonplace items that would not arouse suspicion in a lay person may support probable cause for a law enforcement officer when, in light of the circumstances and based on his experience and training, the items reasonably indicate a relation to illegal activity.” State v. Griffith, 2006 UT App 291

c. Reliability of Witnesses

- i. Courts are to look at the totality of the circumstances
- ii. “Reliability”
 1. “an identified citizen informant is high on the reliability scale. The ordinary citizen-informant needs no independent proof of reliability or veracity. We simply assume veracity when a citizen-informant provides information as a victim or witness of crime.” State v. Comer, 2002 UT App 219
 2. “informants are considered less reliable when they are anonymous or when they receive their information through criminal activity or are motivated by pecuniary gain.” State v. Roybal, 2010 UT 34
 3. “a personally involved informant is not presumed to have any lesser or greater reliability than any other identified informant.” State v. Roybal, 2010 UT 34
 4. “Admissions of crime ... carry their own indicia of credibility-sufficient at least to support a finding of probable cause to search.” United States v. Harris, 403 U.S. 573 (1971)

- iii. "Basis of knowledge"
 - 1. First-hand observation is more reliable.
 - a. "Clearly this first-hand knowledge bolsters his credibility" State v. Sadler, 2004 UT 105
 - b. "A tip is more reliable if it is apparent that the informant observed the details personally, instead of simply relaying information from a third party." Kaysville City v. Mulcahy, 943 P.2d 231, 236 (Utah Ct.App.1997)
- iv. Corroboration
 - 1. Verification of "innocent" details boosts reliability.
 - 2. "Because an informant is right about some things, he is more probably right about other facts." Spinelli v. United States, 393 U.S. 410 (1969); State v. Sadler, 2004 UT 105
- d. Staleness
 - i. When "so much time has passed that there is no longer probable cause to believe that the evidence is still at the targeted locale" State v. Norris, 2001 UT 104
 - 1. Will depend on the evidence – drugs v. stolen furniture
 - ii. the "mere passage of time does not necessarily invalidate the supporting basis for the warrant." State v. Hansen, 732 P.2d 127 (Utah 1987)
 - iii. "where the affidavit properly recites facts indicating activity of a protracted and continuous nature ... the passage of time becomes less significant." State v. Stromberg, 783 P.2d 54 (Utah Ct.App.1989)
- e. Connect the probable cause to the items described and the places to be searched
 - i. "an affidavit that details only the facts showing that the accused had been involved in selling drugs will never allow a reasonable inference that those drugs are stored at the accused's residence." State v. Vasquez-Marquez, 2009 UT App 14

- IV. Evidence seized from a Suspect v. a Third Party [Rule 40(c)(2)]
- a. if the evidence is in the possession of a person or entity that is NOT a party to the alleged offense, the magistrate must find:
 - i. The evidence cannot be obtained by subpoena; or
 - ii. The evidence would be concealed, destroyed, damaged, or altered if sought by subpoena
 - b. If the magistrate authorized the warrant, the warrant shall contain conditions that protect the third party:
 - i. Against unreasonable interference with normal business; or
 - ii. Against the loss or disclosure of protected confidential sources of information; or
 - iii. Against prior or direct restraints on constitutionally protected rights
 - c. Examples:
 - i. Medical Records
 - ii. Fluids at a hospital from a drunk driver
 - iii. Phone records
 - iv. Business records
- V. Signing Judges: A “search warrant” is an order issued by a magistrate in the name of the state and directed to a peace officer. [Rule 40(a)(3)]
- a. "Magistrate" means a justice or judge of a court of record or not of record §77-1-3
 - i. Does NOT include a court commissioner
 - b. Scope
 - i. Court of Record Judges have statewide jurisdiction
 - 1. §78A-2-220(1) a magistrate “shall have the authority to: (c) issue to any place in the state summonses and warrants of search and arrest and authorize administrative traffic checkpoints under Section 77-23-104.”
 - ii. Justice Court Judges have jurisdiction within their judicial district
 - 1. §78A-2-220 (2)(c) “a judge of the justice court may authorize administrative traffic checkpoints under Section 77-23-104 and issue search warrants only within the judicial district.”
 - 2. Judicial Districts – there are eight in Utah

Serving a Search Warrant

I. How Long is a Warrant Good For

- a. “The search warrant shall be served within ten days from the date of issuance.” Otherwise, it is void. [Rule 40(e)(2)]

II. When Can the Warrant be Served

- a. Default is during the daytime.
 - i. “the magistrate shall insert a direction in the warrant that it be served in the daytime.” [Rule 40(e)(1)]
 - ii. Daytime is defined for arrest warrants as 6 a.m. to 10 p.m. §77-7-5(2)
- b. Nighttime if the magistrate authorizes it
 - i. Must be “sufficient grounds” to believe that a search in the nighttime is necessary because the property might be:
 - 1. Concealed;
 - 2. Destroyed;
 - 3. Damaged;
 - 4. Altered; or
 - 5. For other good reason
 - ii. Nighttime is defined as after 10 p.m. and before 6 a.m. §77-7-5(2)

III. Entry

- a. Knock and Announce: “the officer executing the warrant may use such force as is reasonably necessary to enter if, after notice of the officer's authority and purpose, there is no response or the officer is not admitted with reasonable promptness.” §77-23-210 (1)
 - i. “We recognize the interest of law enforcement in a bright-line standard; however, we decline the State's invitation to establish such a standard. A determination of ‘reasonable promptness’ under the statute must be made under all the circumstances, which obviously vary from search to search.” State v. Thurman, 846 P.2d 1256 (Utah 1993)
 - ii. “Inasmuch as the occupant then had no right to refuse the officer admission once the door was open and authority and purpose announced, no interest served by the knock and announce statute would be furthered by requiring the officers to stand at the open doorway for a period of time in order to determine whether the occupant means to admit them.” State v. Floor, 2005 UT App 320

- b. No Knock: “the officer executing the warrant may use such force as is reasonably necessary to enter without notice of the officer's authority and purpose, if the magistrate issuing the warrant directs in the warrant that the officer need not give notice.” §77-23-210 (2)
 - i. Rule 40(j) Magistrate must make findings that if notice were given:
 - 1. the object of the search may be:
 - a. Quickly destroyed;
 - b. Disposed of; or
 - c. Secreted;
 - 2. Physical harm may result to any person

IV. Leaving After the Search

- a. Leave a copy of the warrant:
 - i. “A copy of a search warrant shall be served in a readable form upon the person or place to be searched.” [Rule 40(d)]
- b. Leave a receipt:
 - i. If the officer seizes any property, he “shall give a receipt to the person from whom it was seized or in whose possession it was found.” [Rule 40(f)]
 - ii. If there isn't anybody around, leave the receipt where the property was found

V. Finalizing the Search Warrant

- a. Rule 40(g): “The officer, after execution of the warrant, shall promptly make a signed return of the warrant to a magistrate of the issuing court and deliver a written or recorded inventory of anything seized, stating the place where it is being held.”

Sealing the Warrant

I. Search Warrants are Public Records:

- a. All warrants are sealed for twenty days “following the issuance of the warrant” unless otherwise ordered. [Rule 40(i)]

II. Application to seal [Rule 40(m)]

- a. May be made by prosecutor or peace officer
- b. May be written or otherwise
- c. What can be sealed:
 - i. Applications for search warrants
 - ii. Search warrants
 - iii. Affidavits upon which warrant is based
 - iv. Application for sealing
- d. Documents remain sealed until good cause is found to unseal

III. Standard for Sealing

- a. Magistrate must find that all or part of the information would:
 - i. Cause a substantial risk of harm to a person's safety;
 - ii. Pose a clearly unwarranted invasion of or harm to a person's reputation or privacy; or
 - iii. Pose a serious impediment to the investigation

IV. Unsealing the Document:

- a. Must be a person with standing
 - i. §63G-2-301(2) search warrants are public records
 - ii. KUTV v. Bullock, 743 P.2d 1166 Standing if contest the right of access to public records (does not mean access is granted)
- b. Must provide notice to the prosecutor AND the law enforcement agency
- c. If there is an objection, the court may hold a hearing
- d. "The court may order copies of the documents to be delivered to a designated person without unsealing the documents and require the person receiving the documents not to disclose the contents to any other person without the authorization of the court."

E-Warrants

- I. Authorized by Rule 40(l) and Rule 40(i)(2)(C)
 - a. State v. Rodriguez, 2007 UT 15 “Over the past twenty-five years, all branches of Utah’s government have participated in overseeing an evolution of the warrant acquisition process. Under current rules, police can readily obtain a warrant, in most circumstances, in a very short amount of time.” Note that Mesa, Arizona can do it in 15 minutes and they are “confident” we can meet that standard.
 - b. State v. Gutierrez-Perez, 2014 UT 11 “Based upon our analysis of the historical understanding of what constitutes a constitutionally valid “affirmation,” we conclude that the language used in Utah’s eWarrant system comports with that understanding and is therefore constitutionally sufficient to support the issuance of the warrants executed in this case.
- II. Types of Warrants
 - a. General
 - b. Blood DUI
- III. Pre-Fill Boxes
 - a. Uses Hero Statement for logged in UCJIS user
 - i. Affiant must be the person logged in
 - b. Use “Affidavit” button to preview the affidavit and warrant and make corrections
- IV. Print out copy to leave with person or property
- V. Use system for Returns